

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Second Periodic Review of the)	MB Docket No. 03-15
Commission's Rules and Policies)	
Affecting the Conversion to)	RM 9832
Digital Television)	
)	
Public Interest Obligations of TV)	MM Docket No. 99-360
Broadcast Licensees)	
)	
Children's Television Obligations of)	MM Docket No. 00-167
Digital Television Broadcasters)	
)	
Standardized and Enhanced Disclosure)	MM Docket No. 00-168
Requirements for Television Broadcast)	
Licensee Public Interest Obligations)	

To: the Commission

COMMENTS ON
NOTICE OF PROPOSED RULEMAKING

CAVALIER GROUP, LLC
R. Nash Neyland
2679 Crane Ridge Drive
Suite C
Jackson, MS 39216
(601) 420-7029

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SUMMARY OF CAVALIER'S COMMENTS

Cavalier Group, LLC., (“Cavalier”) participated in Auction # 44 and was the winning bidder on and has timely paid in full for new licenses covering major metropolitan markets such as New York - Newark, Boston and Philadelphia, as well as for smaller markets such as Jackson and Hattiesburg, MS. Cavalier intends to use its licenses to provide broadband services to its respective markets, thereby providing significant competition to the wireless, wireline and cable industries. It is, however, questionable whether Cavalier will be able to begin to utilize its licenses in the reasonably foreseeable future, even in those markets where we have no television station interference. There is a general perception in the financial, manufacturing and telecommunications markets that the broadcast industry will be able to extend the transition to Digital Television (the “DTV Transition”) many years past the end of 2006. This “Incumbency Perception” not only adversely affects Cavalier’s ability to finance system build-out, but also the availability of system equipment and the consumer devices tuned for the *700 MHz Band*. Until such time as it becomes apparent that the broadcast industry will not be able to extend the DTV transition indefinitely, the *700 MHz Band* in general, and Cavalier’s licenses in particular, may remain unutilized or underutilized. There are numerous steps the FCC can take at this time which would further the DTV Transition and address the Incumbency Perception problem while taking into account the financial concerns of many small television stations and protecting consumers.

Certain Fundamental Issues Guide Our Comments

There are several fundamental issues underpinning the DTV Transition which serve as a basis for our comments. First, it should be remembered that the DTV Transition was not forced on the broadcast industry by the FCC or Congress. Instead, the

DTV Transition was initially proposed by the broadcast industry. As such, the FCC should hold the broadcast industry to its representations and commitments made early in the DTV Transition process. These representations have served as the basis of the FCC's rules and regulations that were adopted to govern the DTV Transition process.

Second, the "target date" for the DTV Transition, December 31, 2006, is *not* a date established for Congressional budgetary purposes. Instead, December 31, 2006 was a date initially established by the FCC as the target date based on what the FCC believed could be accomplished by the broadcast industry with respect to digital penetration if the stations were held to the construction, replication and simulcasting deadlines initially proposed after years of rulemaking proceedings. As such, there should be no reluctance on the part of the FCC to establish deadlines for construction, replication, channel election, maximization and simulcasting which are early enough to make December 31, 2006 a realistic target date for the end of the DTV Transition.

Third, throughout these proceedings the FCC has consistently stated that the two essential objectives of the DTV Transition are to (a) promote and preserve free, universally available, local broadcast television in a digital world, and (b) to promote spectrum efficiency and a rapid recovery of spectrum. These essential objectives should carry equal weight. We believe that too little emphasis has been placed thus far on the second objective. It is not an efficient use of spectrum to allow a station which cannot afford to construct and effectively operate a digital station that fully replicates its NTSC Grade B Service area to retain its DTV channel. Stations that have not constructed digital stations, or which have constructed digital stations but are providing minimal signal coverage and programming, do not promote the DTV Transition. In fact, such stations are holding up the entire DTV Transition by lobbying hard for, and in most cases

obtaining, deadline extensions and relaxed operating parameters which thus far have affected *all* broadcast stations.

Fourth, the FCC, probably against its better judgment, determined that it would not consider the financial ability of a station to actually construct and operate a digital station as a condition precedent to the grant of a DTV channel to the station. The broadcast industry convinced the FCC that financial ability should not be considered because it was unnecessary. The hard transition target date of December 31, 2006, the broadcast industry's track record, and the need of the stations to remain competitive could be expected to drive the rapid construction and effective operation of digital stations. "Financial inability" now seems to be a predominant factor in many decisions that have resulted in deadline extensions and relaxed operating parameters for *all* stations, not just those stations suffering financial hardships in meeting the digital operation obligations. Financial inability should no longer serve as a basis for *extending* deadlines or *relaxing* operating parameters, but it should be used to reclaim unused or underused spectrum and to reclaim spectrum in the *700 MHz Band*. At the very least financial inability should not be allowed to extend deadlines or relax operating parameters for *all* stations, just those which demonstrate true financial inability.

Suggested Clearing Option

It should be apparent by now that every station that was granted a DTV channel allotment will not be able to effectively assist in achieving the DTV Transition. Some stations cannot afford to construct digital stations, or if they do construct, many may build to the minimum requirements and operate at minimum levels. It should also be recognized that stations with out-of-core digital allotments are at a distinct competitive disadvantage because they are being asked to construct a supposedly "temporary" digital

station that, for all practical purposes, may be basically worthless at the end of the DTV Transition period. This could be especially hard on non-commercial stations. We believe that the FCC should use the opportunity of these proceedings to take these factors into account and to craft alternative courses of action which would benefit the broadcast industry in general and help clear the *700 MHz Band* spectrum, all with little or no adverse impact on the DTV Transition as a whole or the television viewing options of consumers.

We propose that the FCC consider following a course of action which we refer to herein generically as the “Clearing Option.” The basis of the Clearing Option is the belief that if a station elects to retain an out-of-core channel, digital or analog, then it must timely construct and operate a digital facility which fully replicates its NTSC Grade B service area and with significant digital programming. On the other hand, a station with an out-of-core channel that elects to “clear” the out-of-core channel prior to the end of 2006, should not be required to construct and operate separate digital facilities. The election, in most cases, would be made by the qualifying stations based on their financial condition and other market factors. In order to protect viewers of out-of-core analog stations which elect to clear *700 MHz Band* spectrum, and to provide an added incentive to stations to clear out-of-core channels, those out-of-core stations which elect to convert to digital on an in-core channel should have the right to require the cable companies in their markets to carry their full digital programming signal *and* to downconvert the digital signal to analog for separate channel cable carriage.

The Clearing Option would provide financial relief to small stations that cannot afford to construct or effectively operate digital stations. It would also benefit those stations that face other significant impediments to digital operations. This proposed

approach would foster efficient use of spectrum and a rapid return of 700 MHz Band spectrum with little impact on consumers. The total number of out-of-core analog and digital stations is but a small percentage of the total number of all analog and digital stations. While a market might lose one, or maybe two, out-of-core analog stations, there should be many other analog and digital stations in the market still providing programming signals. And since penetration by Multichannel Video Programming Distributors (“MVPD”) is already so high in many markets, especially the congested markets, it is certainly likely that only a limited number of television households in a particular market would lose the ability to view programming from the out-of-core analog station(s) which did elect to terminate analog operations. Congress has already determined that the DTV Transition has such significant public policy ramifications that at the end of the transition up to 15% of the television households in a market could totally lose the ability to view over-the-air broadcasting unless they purchased digital equipment. Surely it is acceptable to allow less than half of the television households in a market to lose the ability to view one or two analog channels when other channels remain accessible.

Effective Simulcasting Necessary

Consumer demand for digital programming will not be driven to desired levels as long as the digital programming being offered is basically the same as the stations’ analog programming. Stations should be allowed to broadcast compelling DTV programming that is not offered in analog. Furthermore, timing is everything. Consumer demand for digital will only be driven if digital programming, particularly prime time programming, is offered *prior to*, not 24 hours after, that same program is broadcast in analog. Who wants to watch the “Superbowl” in digital *after* it has been aired in analog?

After December 31, 2005, all new programming should be aired in digital prior to being aired in analog.

Furthermore, consumer demand for digital-to-analog converters will be driven by effective simulcasting. No consumer could be expected to purchase a converter prior to the end of the transition if they can see the same programming on their analog sets. Consumers may purchase converters if it gives them access to compelling digital programming they could not otherwise view, or to a greater number of programs. The FCC must act *now* to create an incentive for manufacturers to develop affordable converter technology or else converters most likely will not be readily available prior the end of 2006. In fact, under Section 309(j)(14), the DTV Transition will never end until converters are generally available!

Dual Must Carry Absolutely Necessary

The fact that cable companies are not required to carry at least one full digital programming stream of each station in its market is one of the greatest impediments to the DTV transition. The FCC should carefully reconsider its stance on dual must carry, or something similar thereto. In addition to a station's analog channel, cable companies should also be required to carry one full digital programming signal of a station, during the DTV transition, but only if the digital programming does not substantially duplicate that same station's analog programming on a timing or content basis. At the same time, however, during the DTV transition each station should be required to grant retransmission consent for its digital programming. MVPDs should not be required to pay for a station's digital programming during the transition. That way the MVPDs are somewhat compensated for their carriage of an additional programming stream and the two programming streams would not be duplicative, at least as to timing. If such a

“transitional must carry” obligation cannot be required by the FCC or agreed upon by the MVPD and broadcast industries, then the FCC should adopt December 31, 2005, as the date after which broadcasters would lose the right to demand carriage of their analog signal, but gain the right to demand must carry of up to up to three Standard Definition Television (“SDTV”) programming channels or one SDTV and one High Definition Television (“HDTV”) channel.

Section 309(j)(14) is the Greatest Impediment to the Transition

We believe that the single greatest impediment to the DTV transition is the transition extension provisions of Section 309(j)(14). The number and complexity of the questions raised in the NPRM regarding the potential interpretation of Section 309(j)(14) demonstrate that, as drafted, it is vague at best, subject to manipulation with ease, practically unworkable, will be costly and time consuming for the FCC (therefore taxpayers) to implement, and has the potential to generate litigation that could extend the DTV transition for many years. Section 309(j)(14) demands Congressional attention and we believe it is the obligation of the FCC, as the agency primarily responsible for its interpretation and implementation, to make that fact known to Congress. We acknowledge and agree that the FCC has the expertise to interpret and implement such provisions of the Communications Act. However, regardless of the manner in which the material provisions of Section 309(j)(14) are interpreted, history demonstrates that the risk of litigation in matters such as this can be significant. It is not unforeseeable that after December 31, 2006, the FCC could be subject to separate lawsuits in every district court in the nation contesting interpretations of various provisions of Section 309(j)(14) or the FCC’s survey results and analysis regarding digital penetration levels.

Absent Congressional attention, Section 309(j)(14) must be interpreted in a manner that will allow the achievement of its originally intended purposes, which includes not only the protection of analog viewers, but also the return of spectrum. Section 309(j)(14) must be interpreted in such a manner that it cannot be manipulated, is legally sustainable, and cannot be used to extend the DTV transition indefinitely so that the “national scandal” of the \$11- \$70 billion giveaway comes to fruition.

The Public Must Be Accurately and Timely Informed

There are many other serious impediments to the DTV transition, not the least of which is the lack of effective public education. The fact that over 40% of Americans may not even know about the DTV transition and its potential impact on their ability to watch television is proof that the television public is uninformed regarding the transition or confused at best. There is still time to adequately inform the public, even if December 2006 is the actual termination date of the DTV transition. The FCC, the broadcast and MVPD industries and equipment manufacturers should each take immediate action to properly inform and educate the public. Broadcast stations should be required to begin provision of DTV transition public service announcements that have been drafted or approved by the FCC. Finally, we see no public interest objective that possibly could be served by failing to require clear and conspicuous equipment labeling.

Summary Conclusion

Cavalier would also like to take this opportunity to recognize and applaud those stations which have timely built and are operating digital facilities at more than minimum levels, especially the top four networks and their affiliates (the “Top Four Stations”) and the public broadcasting stations that are operating in digital early. The Top Four Stations have been asked to drive the DTV transition among broadcasters, and they apparently are

doing so. They should be rewarded in some manner for their leading efforts. Instead they are being penalized by those stations that have not constructed facilities in a timely manner and that take every possible step to extend the transition by pushing for further relaxation of deadlines and operating parameters.

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To: the Commission

**COMMENTS ON
NOTICE OF PROPOSED RULEMAKING**

Cavalier Group, LLC ("Cavalier") hereby files its Comments on the Notice of Proposed Rulemaking in the above captioned matter.

I. CAVALIER'S INTEREST IN PROCEEDINGS

1. Cavalier participated in FCC Auction No. 44 and acquired C Block licenses for channels 54 and 59 within the *Lower 700 MHz Band* covering major metropolitan areas such as New York – Newark, Boston-Brockton-Lowell and Philadelphia, PA, as well as smaller markets such as Jackson and Hattiesburg, MS, and Sussex County and Hunterdon County, NJ. Its current intent is to utilize the 700 MHz licenses ("Licenses") to provide wireless broadband and other services to consumers in its licensed markets. However, by and large Cavalier, as well as other holders of 700 MHz licenses ("New Licensees"), may

be unable to do so until after the end of the DTV transition. This is true even though Cavalier and many other New Licensees may not have incumbent television station interference issues in certain of the markets covered by their respective Licenses.

2. Cavalier has faced, and expects to continue to face, hardships in obtaining financing necessary to build-out and operate systems required to provide wireless broadband services, primarily due to the general perception shared by many that the television broadcast industry will be able to prolong the DTV transition well past the end of 2006 (the “Incumbency Perception”). The Incumbency Perception is not only affecting our ability to finance operations, it is also stifling technological development of equipment necessary to provide services over the entire *700 MHz Band*. Additionally, the Incumbency Perception hinders development of the commercial and consumer devices that would utilize such services. A level of broadband deployment over what may be the best available spectrum for 3G and above services is thwarted, or at least severely restricted, by the Incumbency Perception. We believe that once it becomes apparent that broadcast stations will in fact be required to clear the *700 MHz Band* some time in the reasonably foreseeable future, or if the FCC takes actions to help clear the *700 MHz Band*, the wireless industry and its supporting industries – system operators, equipment manufacturers, technology, software and program developers – will focus their attention and expertise on the 700 MHz spectrum and help the United States retain its leadership role in broadband and wireless services.

3. We believe the *700 MHz Band* is the best available spectrum for broadband. Its excellent propagation characteristics, interference protection and security features will be necessary to drive a robust commercial and consumer demand for broadband services.

The *700 MHz Band*, when cleared of television incumbency, will provide significant

competition to the wireless, wireline and MVPD industries. It can be used to provide a true mobile wireless broadband service with data rates at least equal to, and in many cases greater than, cable, wireline and other wireless rates, and with accompanying voice and video applications. The “last mile” issue prevalent in wireline competition is far less an issue to wireless digital services. If competition, universal broadband deployment and spectral efficiency are truly central policy objectives of the FCC today, then there may be no better place to promote these objectives than in the DTV transition arena.

II. GENERAL COMMENTS AND SUGGESTED CLEARING OPTION

Two Essential Objectives of DTV Transition

4. The FCC has consistently stated that its two primary or essential objectives in its DTV transition rulemaking process are the intent to:

- (a) promote and preserve free, universally available, local broadcast television in a digital world, and
- (b) promote spectrum efficiency and a rapid recovery of spectrum.

5. We believe it is necessary to review all DTV transition rules and regulations in light of each of these primary objectives and with equal weighting. The initial plan was that each station granted a digital channel would participate in transition efforts by constructing and operating a separate digital station. It is now apparent that each station granted a digital channel may not be able to effectively further the transition and those station’s digital channels should be reclaimed. Stations which are unable or cannot afford to construct and operate digital facilities fully replicating their NTSC Grade B service area do very little, if anything, to promote the DTV transition. Cavalier asserts that if a station cannot afford to construct and effectively operate digital facilities now, there is little reason to expect that they will be able to do so in the future. At the very least the

inability of some stations to construct and effectively operate digital facilities should not be grounds to extend the DTV transition for *all* stations.

6. We would also note that it is not an essential objective of the DTV transition to give all persons who watch television a better picture with better audio and the added features which digital is able to provide. Better pictures, audio and other features would be a natural result of the DTV transition *only* to those television households which elect to purchase equipment capable of taking advantage of digital broadcast. This is an important distinction because at the end of 2006, or at the end of the DTV transition, the focus should be on the number of households that do not have at least one set capable of receiving available television programming. For example, if a cable company downconverted the digital signal from a station to analog, the cable company's analog customers would still be able to see the programming and should be counted toward the 85% penetration target.

The Broadcast Industry Has "Won" at Virtually Every Stage

7. The broadcast industry has deftly altered the primary intent of transition process from one in which the stations would drive consumer demand for DTV, to one in which consumers (digital penetration) would drive the need for digital broadcasting. It is now time for the FCC to reclaim the initial intent by establishing and enforcing expedited construction, replication, maximization and channel election deadlines and adopting more effective simulcast or digital programming obligations. The broadcast industry should not be allowed to continue to "win" at every turn in these proceedings. The broadcast stations' simulcast obligations were intended to be their method of payment for free "temporary" digital channels. A station cannot simulcast over its NTSC Grade B service

area if it doesn't build and operate its digital facilities with full replication. Stations cannot begin to even plan to move in-core until channel elections are made. Extending stations' construction and operating deadlines or relaxing operating parameters until the consumer demand reaches higher levels will guaranty an extension of the DTV transition. Such action frustrates one of the primary purposes of Section 309(j)(14).

8. In the course of these proceedings it should be remembered that it was the broadcasters who sought the DTV transition, not Congress or the FCC. Nevertheless, thus far the broadcast industry, in general, has been able to get virtually all extensions and changes they have asked for. For example, broadcasters wanted a 6 MHz digital channel with flexible use rights, and they got it. In addition, broadcasters did not want to pay for a digital channel, so they were awarded free digital channels despite concerns that such action could result in a "national scandal" or result in a \$70 billion giveaway.

Broadcasters did not want the FCC to consider the financial ability of a station to build and operate digital facilities as a condition necessary for the granting of a digital channel. Unsurprisingly, and probably against the FCC's better judgment, agreed. Broadcasters did not agree with initial FCC actions establishing channel election, replication and maximization dates, so they got those dates extended. Furthermore, roadcasters did not want to simulcast a significant portion of their analog programming in the early stages of the transition. So, they convinced the FCC to phase-in simulcasting obligations over time even though the obligation to simulcast was viewed as, in effect, the payment for the stations' purportedly "temporary" DTV channels. When the FCC initially adopted a December 31, 2006, transition date, broadcasters argued hard for specific transition extension provisions. The FCC however refused to adopt the suggested transition

extension guidelines. Broadcasters then turned their attention to Congress with the result being the transition extension provisions of Section 309(j)(14).

9. The common thread running through virtually all construction and operating extensions and relaxed operating parameters has been the “financial inability” of some stations to meet deadlines initially established by the FCC in earlier proceedings. This is so even though the broadcast industry represented that the financial ability of a station to construct and operate digital facilities should not be a concern because market forces, the need to compete, and a then established hard transition date of December 31, 2006, could be expected to force the timely construction and operation of digital facilities. It must be noted that prior to the Balanced Budget Act of 1997 the FCC determined that the end of 2006 was a reasonable target date for the end of the transition if stations were held to then existing construction and operating requirements which were themselves based on broadcast industry representations. Financial hardship should no longer be a reason to extend the transition for *all* stations.

Delinquent Stations Materially Hamper the DTV Transition

10. The broadcast industry in general, and the top four stations in particular, have already invested substantial capital and human resources in promoting the DTV transition. Some stations, however, are in fact prolonging the transition by their failure to timely construct and operate digital facilities with signal coverage that replicates their NTSC Grade B service area and with sufficient digital programming. These stations are herein referred to as “Delinquent Stations.” Some Delinquent Stations have legitimate reasons for their failure to timely construct and operate, and it is not those stations that we are particularly concerned with at this time. It is those Delinquent Stations that do not

have significant obstacles but are yet to construct digital facilities, or have constructed but operate only at minimal levels that should be of concern to the FCC and the broadcast industry as a whole. These Delinquent Stations, as well as those stations that have been built but operate at minimal levels, most likely have very little real impact on the DTV transition. In fact, those stations, even if operating, are actually delaying the DTV transition as a whole through lobbying efforts for regulations and regulatory actions that extend construction deadlines and reduce operating obligations for *all* digital stations. It is now time to recognize that not all stations will be able to further the DTV transition by operating a digital station, and proceed henceforth with those that can.

Cavalier's Proposed Clearing Option

11. We offer herein a potential course of action that the FCC could take at this time that would further the DTV transition and help reclaim valuable *700 MHz Band* spectrum which could be used to provide broadband services to all areas of the nation – both metropolitan and rural. We refer to this potential course of action herein as the “Clearing Option.” The Clearing Option would have minimal or no adverse impact on the DTV transition as a whole and reduce the financial burden on a fair number of stations with minimal adverse impact on consumers. The Clearing Option is based on a “use or loose” approach. If a station is going to continue to hold an out-of-core channel, then it must fully and effectively utilize the digital channel or loose it. The choice is theirs unless the FCC determines to make the choice for them. As such, we propose that the FCC consider the following course of action.

12. *Non-commercial stations.* Non-commercial stations with out-of-core digital allotments should be allowed to flash convert to digital on an in-core channel if they

relinquish their out-of-core digital channel. If they elect to keep the out-of-core channel, then they should be required to timely construct digital stations which fully replicate their NTSC Grade B service area and provide substantial digital programming.

13. *Digital Commercial Stations - Unbuilt.* Commercial stations with out-of-core digital allotments which have not constructed their digital facilities by May 1, 2003 should be required to forfeit their out-of-core digital allotment. Such stations could then be allowed either to construct digital facilities on an in-core channel if and when one becomes available or convert to digital on their in-core analog channel no later than December 31, 2006.

14. *Digital Commercial Stations – Built.* Commercial stations with an out-of-core digital allotment that have constructed their digital facilities would be given the option either to (a) terminate digital operations and forfeit their digital channel, or (b) operate their digital facilities with full replication and with significant programming by December 31, 2004. If such a station elects to forfeit its out-of-core digital channel, then it could then be allowed either to construct digital facilities on an in-core channel if and when one becomes available or to convert to digital on their in-core analog channel no later than December 31, 2006.

15. *Analog Commercial Stations.* Analog commercial stations located out-of-core that have an in-core digital allotment should be given an option either to (a) construct and operate their in-core digital facilities with full replication and significant digital programming, or (bi) move analog operations to the in-core channel or convert to digital on the in-core channel, thereby clearing the out-of-core channel.

16. *“Must Carry” Rights and the Clearing Option.* In order to protect viewers of out-of-core analog stations which elect to clear the *700 MHz Band* spectrum, and to

provide an added incentive to stations to clear out-of-core channels, the FCC should provide dual must carry rights to the stations that elect to “clear” the out-of-core channels. Those stations that elect to convert to digital on an in-core channel should have the right to require the cable companies in its market to carry its full digital programming signal *and* to downconvert the digital signal to analog for separate channel cable carriage. In that manner the cable company customers of the clearing or converting analog station will still be able to see the programming of the clearing analog station until the end of the transition.

17. *Clearing of Stations which Elect to Retain an Out-of-Core Channel.* Stations which elect to retain their out-of-core channels but fail to meet construction and operating deadlines and parameters should be subject to a meaningful financial penalty and required to move in-core no later than December 31, 2006. The FCC would then determine whether the defaulting station should broadcast in analog or digital on the in-core channel and their “must carry” rights at that time.

18. *Potential Phase-In of Clearing Option.* In order to give the FCC the opportunity to study the utility of the Clearing Option and its impact on the DTV transition, the Clearing Option should be phased-in with out-of-core stations on Channels 54, 55 and 59 (“Auctioned Channels”) being granted the opportunity to make the election now. If the Clearing Option is effective in helping clear the Auctioned Channels without a material adverse impact on the DTV transition, then the FCC could subsequently allow other out-of-core channels to make the election. As such, at this stage the Clearing Option alternative is a test to its utility which would have a minimal impact on the off-the-air viewing public while reducing the financial burden on a limited number of out-of-core stations. Those stations electing a Clearing Option would be rewarded for assisting in the

clearing of Auctioned Channels which in and of itself promotes efficient use of spectrum and the development of new broadband and other wireless digital services.

19. *Limited Initial Phase-In Warranted.* Limiting the Clearing Option alternative to only those out-of-core stations on Auctioned Channels at this time is warranted because licenses for those channels either have been or will soon be auctioned. Until it is proven that the Clearing Option is effective in helping to clear the Auctioned Channels, the Incumbency Perception will continue to adversely impact the prices the FCC should expect to receive in auctions of licenses for other channels in the *700 MHz Band*. The fact that some out-of-core stations would not be able to take advantage of the Clearing Option initially (those on channels other than Auctioned Channels) should bear little weight at this stage of the DTV transition because they are only being required to meet already existing DTV transition obligations. It should not take long, maybe less than one year, to determine if the Clearing Option works without undue impact on the DTV transition as a whole.

Supporting Arguments for the Clearing Option

20. *Out-of-Core Digital Stations Suffer Competitive Disadvantage.* Stations with out-of-core DTV channels are at a distinct competitive disadvantage to those lucky stations with in-core DTV channels. Stations with an out-of-core DTV allotment are being asked to construct and operate a station that is expected to have a limited lifespan. At or by the end of the DTV transition they may not be able to use their then existing digital equipment for the new in-core digital facilities. Doubtlessly this has had an adverse impact on the construction and operation of out-of-core digital facilities, and it is understandable why. Why would such a station voluntarily choose to go to the time and

expense of constructing a full service digital facility that fully replicates their NTSC Grade B service area, especially if it does not increase income to offset the increased expense? Sure the initial thinking was that providing a digital signal would help drive consumer demand for DTV, which it certainly could, but let's be realistic here. If stations with out-of-core DTV channels are delaying construction and, when operating, choosing to operate at the lowest allowable levels with the minimal amount of programming, how much digital demand could they realistically be expected to drive?

21. *Clearing Option Furthers Essential FCC Objective.* The Clearing Option furthers the FCC's long-standing objective in these proceedings by reducing the DTV related costs to out-of-core stations, both analog and digital, and giving such stations the right to make their own business decision concerning the continued use of the *700 MHz Band*. The Clearing Option fosters voluntary clearing of the *700 MHz Band* in a manner that is "win-win" for both out-of-core stations and New Licensees. This proposal also fosters the efficient use of spectrum, furthers the development of broadband nationwide, and potentially reduces the FCC workload in connection with the DTV transition, all with very little impact on the off-the-air viewing public.

22. *Minimal Adverse Impact on Consumers.* The Clearing Option would have limited impact on the off-the-air viewing public and the DTV transition as a whole. There is a limited number of analog stations on the Auctioned Channels, and even if they all took advantage of the Clearing Option and converted to an all digital broadcast format this year, in the vast majority of the affected markets the off-the-air television viewers would still have access to other analog and digital local broadcast programming. With MVPD penetration already at the 85% level nationwide, the number of off-the-air analog viewer households is already less than the number of off-the-air analog households that could be

completely cut-off from off-the-air analog programming after the end of the DTV transition. So the possibility of taking away access to one or a few analog programming channels in a given market prior to the end of the DTV transition should be, and we believe has been, anticipated and allowable. As the FCC noted in the NPRM, Congress anticipated that not all stations would convert to all digital programming at the same time. Furthermore, Section 309(j)(14) does not *require* any station to seek an extension of the transition, regardless of the digital penetration level in their market, at the end of 2006.

23. *Concern For Potential Spectrum Warehousing.* It is well recognized that some out-of-core stations may not take advantage of the Clearing Option and clear out-of-core channels voluntarily. The FCC should be concerned that some stations with out-of-core DTV channels, especially those which have failed to meet construction deadlines or failed to meet minimum operational parameters, may be engaged in spectrum warehousing. If a station with an out-of-core DTV channel cannot afford to build and operate digital facilities on time and at least at regulatory minimum levels, there is little reason to believe that such a station would be able to afford to later. Those stations clearly are not aiding the DTV transition, even if they wanted to, and their allocated spectrum stands a very real chance of remaining dormant until the end of the DTV transition. In order to further the rapid recovery of spectrum and its efficient use, the FCC should undertake an analysis of those stations with an out-of-core channel, digital or analog, which have the opportunity to but fail to take advantage of the Clearing Option, and determine whether, in light of their particular circumstances and future prospects, the Clearing Option should be made for them. The focus should start with those stations delinquent in meeting digital construction and operational deadlines, as well as those with

limited financial ability to properly utilize their DTV allotment channel to further the DTV transition.

No Reason To Distinguish Between Lower and Upper 700 MHz Bands

24. In numerous places throughout the NPRM the FCC addresses a potentially inconsistent application of a rule based on a determination of whether it is being applied to the *Lower 700 MHz Band* or the *Upper 700 MHz Band*. The proposed distinction seems to have its basis, in most part, from earlier assumptions that the *Lower 700 MHz Band* would be auctioned after the *Upper 700 MHz Band*. That assumption was wrong and the distinctions between *Upper* and *Lower 700 MHz Bands* should not continue. Auction dates for *Upper 700 MHz Band* spectrum have not been established and it may be wise to forgo such auctions until the Incumbency perception has been effectively addressed.

Notice of Actions Affecting New Licensees

25. There is a wide variety of situations in which a station with a DTV or analog channel located out-of-core can request certain approvals that could affect New Licensees in a materially adverse manner. The FCC should amend applicable rules to require that New Licensees be given written notice of all such actions and an opportunity to participate in the regulatory review process. New Licensees have a valuable property right in their Licenses and should not be expected to scour the FCC website and records daily just to determine if some station is considering taking any action that would affect the New Licensee such as a particular construction extension, replication or maximization action, an action to allow a channel swap, or the granting of a new broadcast license, permit or authority on an out-of-core channel.

III. COMMENTS REGARDING SECTION III OF NPRM

Strict Deadlines Are Effective

26. The Top Four Stations, particularly those in the top 30 television markets, have demonstrated that they are serious about the DTV transition and have in fact paved the way for the remaining stations. The fact that virtually all of these stations have timely constructed and are operating digital facilities clearly demonstrates that when stations are held to strict deadlines, by and large they meet their obligations. We are concerned, however, that some of the stations which have constructed and are operating digital facilities may not be effectively providing a digital signal to their communities. For example, a station operating at the minimally required level may have its digital signals drowned out by adjacent stations operating a higher power levels. Digital stations should be required to provide the FCC with independent verification of their signal strength and coverage.

No Further Extensions of May 1, 2003 Deadline

27. Any station subject to the May 1, 2002 construction deadline that has failed to construct a digital station by May 1, 2003, other than for a truly bona fide reason (of which financial hardship is not a bona fide reason), should be required to forfeit their digital allotment. These "Defaulting Stations" have failed to meet their public interest obligation of promoting the DTV transition. Their continued failure to timely construct and operate must be viewed as nothing other than spectrum warehousing. Admonishment, additional reporting requirements and the potential loss of interference protection cannot be expected to get stations built and operating.

28. Any forfeited license for an out-of-core channel should be deleted from the DTV Table of Allotments and not subject to reassignment to any other television station – that is, deemed to be “cleared”. If the forfeited channel is in-core, every effort should be made to reallocate an out-of-core DTV allotment to the forfeited channel, with priority being granted to relocating out-of-core DTV allotments in the 700 MHz spectrum for which New 700 licenses have been sold by the FCC.

29. Cavalier recognizes that some stations have been unable to meet construction and operation deadlines for bona fide reasons. However, a construction deadline for such stations must be established. We propose that the deadline be December 31, 2005. If they cannot construct and operate digital facilities by the end of 2005, especially if their initial deadline was no later than May 1, 2002, it should be recognized that they were at an impasse incapable of reasonable conclusion, and the DTV allotment forfeited, especially if it is on an out-of-core channel. However, these stations should be allowed to convert to digital on its in-core analog channel without being subject to competing applications.

Digital Tuner Mandate and Plug-and-Play

30. We applaud Chairman Powell’s efforts to promote the DTV transition, and urge continued attention from that office. The transition needs more help from the top. However, voluntary industry participation may not be sufficient at this time. “Tangible commitments” are not a real substitute for regulatory action. Unless agreements can be negotiated in the very near future among the manufacturers, cable and broadcast industries concerning matters such as transitional must carry and “plug and play” compatibility, the FCC must step in and take regulatory action. Furthermore, the FCC

should make sure that voluntary industry agreements do not contain loopholes which would effectively frustrate the goal of having all sets capable of receiving digital signals over-the-air and which will work when connected to a cable provider.

31. It has been reported that over 25 million television sets were sold in the United States in 2001. It is unlikely that a significant portion of those sets were manufactured in the US. We believe that the FCC should, if it can, require that all television sets imported into the United States after December 1, 2003 should have digital tuners, with a graduated phase-in prior to the end of 2006. We believe, like others in the past, that fears that such action would result in pricing many consumers out of the market are overstated. Sets would be priced to meet demand. If one retailer or manufacturer dropped their prices to meet demand, it is certainly reasonable to assume that others would promptly follow suit. Furthermore, such a requirement could be expected to foster technological development.

IV. COMMENTS REGARDING SECTION IV OF NPRM.

Transition Progress in Specific Areas

32. We are firmly convinced that the greatest impediment to the DTV transition is the transaction extension provisions of Section 309(j)(14). The number and complexity of questions raised in paragraphs 69 through 94 of the NPRM illustrate that Section 309(j)(14) is vague at best, subject to manipulation, and conceivably unlikely to result in the clearing of the 700 MHz spectrum until well after the end of the targeted date, December 31, 2006. We believe the transition extension provisions have led many, but not all, of the broadcast stations to believe that they can prolong the DTV transition

indefinitely. As a result, the originally assumed “hard date” impetus which influenced many FCC regulations in the early stages of the DTV transition has been lost.

33. For example, Section 309(j)(14)(B)(iii)(I) is practically meaningless as drafted unless the FCC (i) *requires* cable companies and other MVPDs, especially DBS, to actually carry a digital programming signal from each station in the market, (ii) *requires* each digital station in that market to grant retransmission consent, and (iii) *requires* each digital station in the market to deliver their programming to the cable company(ies) in the market with sufficient power and quality to be transmitted over cable or other MVPD.

Absent such requirements the door for manipulation is wide open. One station in a market, regardless of its market share, could refuse retransmission consent and the MVPD part of this equation is lost.

34. So for all practical purposes, the DTV transition will be subject to extension in any given market unless 85% of the television households in that market have at least one digital set or one digital-to-analog converter. Converters would be the least expensive equipment required to meet this test but realistically, who is going to want to buy a converter if they can see the same programming in analog? Absent the existence of compelling digital-only programming, it is unlikely that any consumer would decide to purchase a converter unless that consumer is faced with losing his ability to watch television

A. Dual Must Carry

35. The second largest impediment to the DTV transition is the absence of a dual must carry requirement. MVPDs are the gatekeeper to a substantial portion of the television viewing public. Demand for local digital programming cannot be expected to grow unless the MVPDs are required to carry the local stations’ digital programming.

We have previously suggested situations where the cable company should be required to carry the digital and analog programming of the same station, such as when the stations provides digital programming prior in timing to the analog programming and where the digital programming is not substantially identical to the analog programming. Dual must carriage should also be used as an incentive to the early clearing of the *700 MHz Band* spectrum as proposed with the Clearing Option. Absent an industry wide dual must carry requirement, applicable only during the transition, the FCC should consider requiring the cable companies to carry one digital programming signal of each of the Top Four Stations in the market based on market share, or requiring cable to carry the digital and analog signals of three or four stations in the market.

B. Lack of Public Education

36. Another significant impediment to the DTV transition is the lack of effective public education efforts. It has been reported that 40% of the television viewers do not even know about the DTV transition and an additional 43% are only “somewhat aware” of it. In addition, a whopping 68% of television viewers do not understand that most television sets will need additional equipment to receive broadcast television after the transition. Demand for digital broadcasting cannot be driven solely by the desire to get a better picture. The FCC, the broadcast industry, set manufacturers, MVPDs and Hollywood must also become more proactive in educating the public about DTV and the DTV transition.

C. Financial Hardship

37. Another significant obstacle to the DTV transition as a whole is the ability of the broadcast industry to use “financial hardship” as an excuse to extend or relax operating deadlines and parameters for all digital stations. We addressed this issue earlier but will

again state our observation that stations that have not timely constructed and which push for further extensions only hamper the DTV transition. Financial hardship should no longer be used as a basis to extend deadlines or operating parameters. On the other hand it should be used to clear out-of-core stations.

D. Ineffective Simulcasting

38. Another obstacle to the transition is the simulcasting requirement as it currently stands and as proposed. Stations should be allowed to provide premium and specialty programming in digital format only. Also, stations should not be allowed to provide digital programming simultaneously with, or anytime *after*, the same programming is provided in analog.

Channel Election

39. Next to station construction, channel election should be a high priority in furthering the DTV transition. It is only after those stations with two in-core channels have made their election that the other stations can themselves make an informed decision. The proposed May 1, 2005 channel election deadline is far too late and puts those stations which must await channel election by in-core stations at a competitive disadvantage to those with two in-core channels. It also fails to take into account that some or many of the stations with two in-core channels may have been operating two stations for at least 3 years.

40. Channel election should be tied to months of operation, with absolute deadlines. Channel elections must be made sufficiently in advance of the end of 2006 so that those stations which must wait on others to make a channel election will have sufficient time not only to “plan” for their move, but to actually move to an in-core channel, by the end

of 2006. Those stations that met their construction deadlines would benefit from longer analysis periods. Those stations that failed to meet construction deadlines would have shorter periods to gain experience, but that would be a result of their own business decisions.

41. We propose the following channel election deadlines for stations with two in-core channels:

Top Four Stations Affiliates - Markets 1-40	December 31, 2003
Top Four Stations – Markets 40-100	May 1, 2004
All other Commercial Stations	November 1, 2004
All Non-Commercial Stations	May 1, 2005

Notwithstanding the foregoing listed deadlines, any station with two in-core channels, whether commercial or non-commercial, should be required to make a channel election by the third anniversary of when they first started broadcasting a digital signal, if such third anniversary is *earlier* than one of the above listed deadlines. Surely three years is a sufficient amount of time to gain operational experience and to make an informed election decision.

42. We believe the above deadlines are reasonable and definitely promote the DTV transition. Why, for example, should a station that has been broadcasting a digital programming signal on an in-core channel since the year 2000 need almost five years merely to make a channel election? Is it not reasonable to assume that many, if not virtually all, of the stations with an in-core digital station would have made such an investment in their digital operations that converting to another channel would be economically infeasible? If a station does not want to fully replicate their market at maximum power now, and desires operational information about matters such as

interference before making a channel election, they can run tests at full power and/or full replication. Stations can also draw from the experience of other stations. There is no need to extend the DTV transition as a whole by delaying channel election any further than absolutely necessary.

43. The FCC should provide an incentive for early channel election by stations with two in-core channels. The FCC could provide a \$20,000 early election bonus to stations which make their channel election at least 6 months prior to their election deadline and \$5,000 if the election is at least 3 months prior to the deadline. The funds for such bonuses could come from 700 MHz auction proceeds and penalties from stations not meeting operating guidelines. If a payment incentive is unavailable under the circumstances, surely other incentives can be crafted.

44. Stations which fail to make a channel election by the deadline should lose the right to make the election. Instead, the FCC should then make the election for them with the first priority being for the FCC to make the election that would best enable the clearing of out-of-core stations or allotments.

45. No station which has an in-core digital channel should not be given the opportunity to convert to another digital channel. In other words, their election has been made. Those stations with two out-of-core channels should have no later than the earlier of May 1, 2006 or that date which is two years after being assigned an in-core digital channel to make their channel election. This would encourage stations with two out-of-core channels an incentive to negotiate and work with other stations in their markets with in-core channels to facilitate early channel elections.

46. Cavalier would support a decision to tie channel election, replication and maximization to the same dates, so long as the earlier dates are used. We are against

tying channel election, replication and maximization if it extends the channel election deadlines. Stations can make their election decisions prior to full time replication and maximization. When to replicate would be a business decision the station would make. If they choose to put off replication, they do so, knowingly, at the risk that it might have a later impact on the operations of the channel they did elect.

DTV/Analog In-Core Channel Swaps

47. The FCC should make every effort to streamline the regulatory processes for in-core channel swaps and any similar arrangement that clears an out-of-core channel. The loss of analog service should not be an issue to the FCC unless the analog station was one of three or less analog stations in the market. Even then, if the analog station that would be lost had less than a certain minimum market share, the transaction should still be approved. The channel swap decision would be a business decision of the requesting station which the FCC should assume was made after the station considered the impact such a swap would have on their market and viewers.

48. Any station should be allowed to convert to all digital on one of their in-core channels (or their only in-core channel) at anytime if they elected to simultaneously terminate their analog broadcast operations. In such instances, the electing station should be required to provide public service announcements a sufficient time in advance of the termination of analog operations to inform their viewing public. Such action not only promotes the DTV transition, but could also reduce the financial burden of operating two stations. That would be a business decision of the electing station which could be assumed to take into account the potential impact on those viewers in its market who or

which rely on off-the-air broadcasts. It could also be expected to spur the development and sale of digital sets and digital-to-analog converters.

49. Footnote 30 in the NPRM points out that currently stations are permitted to file modification applications in order to swap DTV channel allotments. That should not be allowed if the swap involves an out-of-core channel absent a showing of a bona fide and compelling reason that would further the clearing of out-of-core spectrum. Allowing an in-core/out-of-core swap could create the impetus for manipulation by having a station with little intent or financial ability to construct and operate a digital station on an out-of-core channel swapping its in-core channel for an out-of-core channel in hopes of extracting a payment from a New Licensee just to clear. At the very least all New Licensees for the same or adjacent channels should be given direct notice and an opportunity to contest the channel swap.

Replication and Maximization

50. Replication and Maximization will have a direct impact upon digital penetration and the ability of a station to request an extension at the end of 2006. Stations should be required to replicate and maximize a sufficient time prior to the end of 2006 in order to help drive digital demand in their markets. History demonstrates that many stations will continue to stall construction, replication and maximization as long as they are allowed to do so. It is in the public's best interests and in the interest of the rapid recovery of spectrum that broadcasters have the same deadlines for replication and maximization as they have for channel election, but only if the deadlines are earlier, as we have previously explained. Otherwise, replication and maximization deadlines should be structured as follows:

Top Four Stations - Markets 1-40	May 1, 2004
Top 4 Stations – Markets 40-100	December 31, 2004
All other Commercial Stations	May 1, 2005
All Non-Commercial Stations	December 31, 2005

51. Stations that fail to replicate and maximize by these dates should suffer more than mere loss of interference protection. Stations failing to meet these deadlines should be penalized monetarily in an amount sufficient to get their attention. Construction permits and applications for replication or maximization should be dismissed as of the deadlines or modified to specify the facilities in actual continuous operation. Regardless of how the spectrum use opportunity is addressed after the interference deadline for in-core channels, there should be no further television broadcast licenses or rights granted with respect to the out-of-core channels. New Licensees, who have already paid for their licenses, should be able to provide services in the areas for which interference protection was lost without having to protect the defaulting digital station and *with* interference protection *from* the defaulting station. That promotes spectrum efficiency and digital migration.

52. Finally, and more importantly, any digital station that has failed to meet these deadlines should not have the area of their NTSC Grade B service contours which was not covered by a digital signal at maximum power for at least one year prior to the end of 2006 included within their “markets” when considering the transition extension provisions of Section 309(j)(14). Otherwise such a station could benefit by extending the DTV transition in its “market” by intentionally failing to provide a quality digital signal over its analog viewing area. It is crucial that no rule adopted by the FCC in this matter should encourage or facilitate such manipulation.

Interference Protection of Analog and Digital Television Service in TV Channels 51-69

53. The FCC should use this opportunity to reconsider the entire process of granting DTV channels and requiring digital operations on any out-of-core channel, and especially for channels for which an auction to New Licensees has already been held or is scheduled.

Actual Broadcast Parameters

54. The FCC should use the opportunity of these proceedings to level the playing field between the *Lower and Upper 700 MHz Bands*. Since an essential objective of the DTV transition is the efficient use and rapid recovery of spectrum, and since a central objective of the FCC today is broadband deployment, then the fact that the FCC and Congress initially intended that the *Lower 700 MHz Band* would be auctioned after the *Upper 700 MHz Band* should be given as little weight as possible in the future because that is not what actually transpired. Furthermore, since the *Lower 700 MHz Band* is already at a disadvantage to the *Upper 700 MHz Band* due to its higher level of television incumbency, then any rules which further favor the *Upper 700 MHz Band* over the *Lower 700 MHz Band* would serve only to delay broadband deployment over the *Lower 700 MHz Band* for which licenses have already been sold. Finally, since there is no clear cut timetable for the auction of *Upper 700 MHz Band* spectrum, and since the prices paid in the *Lower 700 MHz Band* auctions clearly indicate that Incumbency Perception has, and could be expected to continue to have, a significant adverse impact on the prices that could be expected in any future auctions of *Upper or Lower 700 MHz Bands*, then interference protection and replication deadlines for the *Lower 700 MHz Band* should be

earlier than, but certainly not later than, those same deadlines in the *Upper 700 MHz Band*.

55. History indicates that the mere filing of an application or grant of a construction permit is no guarantee that such facilities will in fact be timely constructed, if at all. Smaller stations, whether in large or small markets, continue to face financial difficulties in both constructing and operating digital facilities. There is a real risk, as recognized by the FCC, that both analog and DTV stations located on channels out-of-core may never serve portions of their replication areas (“Unused Areas”). Since the efficient use of spectrum is an essential goal of the DTV transition, then at least as to the out-of-core stations, interference protection from New Licensees (but not other television stations) should be limited to the out-of-core station’s actual operating parameters on the following schedule:

Top 4 Network Affiliates - Markets 1-40	September 30, 2003
Top 4 Network Affiliates – Markets 40-100	December 31, 2003
All other Commercial Stations	May 1, 2004
All Non-Commercial Stations	December 31, 2004

56. These dates are sufficiently in advance of these proceedings that out-of-core stations will have adequate time to make a business decision regarding their actual use of their channels. Out-of-core stations that have not already constructed digital facilities or which are considering upgrades to existing facilities can factor into their business decisions the more limited interference protection they would receive from New Licensees as to the Unused Areas. This can be done without being concerned with the loss of interference protection over the Unused Areas from other television stations in their markets.

57. New Licensees would then have firm dates after which they could provide wireless services in the Unused Areas. New Licensees would be unlikely to offer services in the Unused Areas so long as there was even a possibility that they might be required to terminate or severely restrict such services if an out-of-core station subsequently increased its signal coverage over the Unused Area or a new television station move into the Unused Area. The possible loss of service would have to be disclosed to potential customers of New Licensees in the Unused Areas, and that alone would make it extremely hard, if not virtually impossible, to attract those customers to a New Licensee's services. The end result is that without this type of assurance to New Licensees, which would be limited to out-of-core channels, it is possible and probably very likely that those portions of the spectrum would remain fallow to both television and new wireless services until the end of the DTV transition. That is not an efficient use of spectrum.

58. Since it is unlikely that a new television station entrant would seek an out-of-core channel for a DTV facility, unless in hope of extracting a payment from a New Licensee, then the FCC should not permit any new stations in the *Lower 700 Band*. In addition, no station with an in-core DTV allotment should be allowed to move to an out-of-core channel absent the consent of each of the New Licensees on and adjacent to the proposed out-of-core channel. To allow an in-core station to move to an out-of-core station at this time, for any reason, only promotes manipulation and could be used to hamper competition. The best course of action should be to protect both the *Lower and Upper 700 MHz Bands* equally in matters such as these. However, should any station be allowed a post-auction channel out-of-core, then that station should not be entitled to interference protection from, and should be required to provide interference protection to,

any New Licensee which then holds a license or subsequently acquires a license in an auction from the FCC for that same or an adjacent channel. These new out-of-core entrants should also be required to rapidly construct and operate their new out-of-core stations with full replication and at maximum power. These potential new television entrants into out-of-core spectrum would then be on notice of their interference rights and obligations with respect to New Licensees. New Licensees, to the extent they can provide services, would have confidence to move forward with their development plans without fear of subsequent interference or potential loss of service. This would also discourage any efforts by a television station to acquire an out-of-core channel in hopes of extracting a payment from a New Licensee.

Channel 51

59. Notwithstanding the fact that channel 51 is an in-core channel, if the FCC ever hopes to effectively auction channel 52 to New Licensees then it will need to provide potential channel 52 New Licensees with certain assurances. The New Licensees must be assured that a new television station entrant on Channel 51 will not effectively preclude them from using their channel 52 license. Going in to an auction, the potential channel 52 New Licensee has the ability to identify those stations to which it will be required to provide interference protection. The cloud of a potential post-auction new television station entrant into Channel 51 in the particular market should be expected to reduce or eliminate interest in any auction of Channel 52. A requirement on new television entrants on Channel 51 to provide interference protection to New Licensees on Channel 52 would also reduce the risk that a purpose of selecting Channel 51 was to extract a

payment from a then existing New Licensee on Channel 52. Gamesmanship of this nature should never be allowed.

Pending DTV Construction Permit Applications

60. It is noted in paragraph 61 of the NPRM that approximately 140 television licensees have not been granted an initial construction permit for a DTV allotment channel for a variety of reasons. To the maximum extent possible these stations should not be granted licenses or permits on out-of-core channels. If they are granted an out-of-core DTV allotment, every effort should be made to allot channel 52 to them, and Auction Channels should be assigned only if there is no other possible alternative. Regardless of which out-of-core DTV allotment channel they did receive, such stations must be required to prove that they have the financial ability to timely construct and operate their facilities with full replication and at full power. In addition they should be required to post a substantial deposit which would be non-refundable if they did not meet the construction and operating guidelines for any reason other than something like an act of God or act of war. Allowing new out-of-core DTV allotments to any one or more of these 140 stations is (a) unlikely to have a significant impact on the DTV transition as a whole, (b) likely to be uneconomical to the stations, (c) will foster inefficient use of spectrum, (d) will “cloud” future auctions, and (e) would materially delay broadband deployment over the 700 MHz spectrum in their markets. It is questionable why any one of these 140 stations would want a temporary out-of-core DTV channel anyway.

Simulcasting

61. The FCC has long recognized that simulcasting would be critical to the success of the DTV transition. In fact, many perceived the simulcasting requirement as tantamount

to the payment television stations would make for their free 6 MHz DTV channel. Early concerns with financial hardship led the FCC to phase in its simulcasting requirements. The phased-in simulcasting requirement has been in place long enough for stations to budget and plan for timely implementation. To eliminate, reduce or extend those dates and programming requirements at this time would only serve to further delay the DTV transition as a whole. The FCC needs to hold fast to its simulcasting deadlines.

62. The demand for digital programming cannot be expected to develop and grow if the viewing public, especially those who elect to use off-the-air programming, do not regularly receive compelling digital programming. As the history of the DTV transition demonstrates thus far, the FCC can no longer rely on “market incentives” to drive the construction and effective operation of digital facilities. Many stations, particularly those with out-of-core DTV, are likely to take every advantage to reduce operational costs. If that means reducing or practically eliminating simulcasting, they could be expected to do so. With respect to those stations which are currently simulcasting a significant portion of their analog programming, they are carrying the DTV transition on their backs, and now is the time to make the other stations carry their own portion of the load themselves.

V. COMMENTS REGARDING SECTION 309(j)(14)

Congressional Action Would be Best

63. We believe that the FCC should inform Congress that if it does not take action to clarify key terms and phrases in Section 309(j)(14), litigation will likely be used to extend the transition in many markets far after the end of 2006. This is so regardless of the fact that the FCC has the expertise to interpret the Section. The reclamation of valuable spectrum and protection of off-the-air television households is too important to

subject these proceedings to judicial second guessing, especially if minimal congressional attention could reduce the litigation risk. For example, any low powered television station in any market could request an extension because Section 309(j)(14) clearly states “for *any station* that requests an extension. . . .” It could be argued that Congress knows how to distinguish between full-power and low-power television stations and based on a plain reading of the statute, *any* low-power or full-power station has the authority to request the extension not only in their market, but in any market. The sheer number and complexity of the questions raised regarding interpretation of the statute clearly demonstrates that there are several additional terms and phrases which demand Congressional attention. Absent Congressional attention, regardless of how the FCC ultimately defines terms such as “any station” or “television market” or “generally available” or “carries,” it is not hard to imagine that a television station that does not agree with the definition will wait until it is being forced to terminate analog operations before filing suit for judicial review.

Filing of Extension Requests

64. In order to give the FCC ample time to begin assimilating data and conducting surveys sufficient to study the various television markets prior to December 31, 2006, the FCC should require that stations file their extension requests no later than June 1, 2006. The filing deadline should be absolute in that if the filing is late, it is lost. Otherwise a filing deadline is meaningless. The FCC does not have statutory authority to grant blanket extensions. The statute clearly contemplates that a station must request an extension for its market. As such, the statute requires a market-by-market analysis.

Definition of Television Market

65. Under the FCC's television licensing regime, when a station is granted a television license that license allows the station to provide a signal without undue interference over a specific geographic area. That specific area is that station's licensed market. Prior to the entrance of cable and other MVPD providers, that station would only have the right to provide a signal in its licensed market. Whether or not the station provided a good programming signal over the entire licensed geographic area was a business decision of the station. The MVPD industry developed due to their ability to provide *their* customers located both inside and outside of a station's licensed geographic market area both better signal reception and more programming choices. Those television households located outside of the station's licensed market area are not "customers" of the station, but "customers" of the MVPD. Since the MVPD customers purchase their access to the MVPD's programming, the MVPD is sensitive to the programming demands of its customers located both within and outside of a particular station's licensed market. Therefore, after the end of 2006 it should be expected that a MVPD would protect its own "analog-only" customers after the DTV transition if demand for a continuing analog type signal reception of a particular station was sufficient to warrant continuation.

66. The term "television market" should be defined as a station's NTCS Grade B service area at most, and a better definition of a station's "television market" would be one that took into account only the geographic area within that station's NTSC Grade B service area that the station had consistently provided quality analog and digital programming signals for a sufficient time prior to the end of 2006. That definition would not include areas of coverage provided by TV translators or other secondary facilities.

Any definition of “market” that includes television households located outside of a station’s NTSC Grade B service area for any reason is inconsistent with the television licensing regime which itself is based on each station having a license to provide programming without undue interference over a defined geographic area. Any definition of “market” which would include television households outside of a station’s NTSC Grade B service area which receives the programming of the station via a MVPD attributes *the MVPD’s customers* to that station. Those MVPD customers located outside of the station’s NTSC Grade B service area would not have received the station’s programming off-the-air if the MVPD did not carry the station’s signal or if the station had not granted retransmission consent. Furthermore, any definition of “market” which includes areas outside of a station’s NTSC Grade B service area could create a temporary expansion of the station’s “market” as the station could subsequently deny retransmission consent. Finally, television households located outside of the geographic area in which the station has consistently provided quality analog and digital signals should not be viewed as “customers” of that station because the station did not care enough about those households to consistently provide them with programming services in the first place.

67. A use of the Neilson DMA to define a station’s “television market” would be inconsistent with the essential objectives of the DTV transition and the purposes of Section 309(j)(14). First a station’s DMA may change annually. Second some DMAs may be very large in geographic coverage. For example, we understand that the New York DMA may be greater than 100 miles end-to-end.

68. The larger the market the less likely that the digital penetration targets will be met. The larger the market, the more 700 MHz band spectrum licenses located within the market. The larger the market, the more unlikely that the MVPDs in that market would

carry programming from all of the stations located in the market. So the larger the market the less likely that the stations in the market would ever have to return one 6 MHz channel. That is contrary to the intent of Section 309 and the DTV proceedings.

69. Section 309(j)(14) should not be interpreted in a manner that would frustrate one of its underlying purposes – the reclamation of a 6 MHz channel from the broadcasters. There is no need to make the markets larger than they need to be to protect a station's over-the-air viewers. Utilizing a smaller geographic market limited to no larger than a station's NTSC Grade B service area provides the intended protection to the station's over-the-air viewers; therefore, is consistent with a major purpose of the section. The fact that a DMA definition may be more administratively expedient has no bearing on how the statute should be interpreted especially since the more expedient DMA type interpretation significantly reduces the likelihood the DTV transition will ever end.

Additional support for a station's television market to be limited to an area no greater than its NTSC Grade B service area is the fact that each station's allotment channel is based on that same coverage area. Service replication was the principal on which the DTV Table of Allotments was based. Simulcasting was viewed as, in effect, the compensation to be paid by the broadcast stations for their additional 6 MHz channel. Stations were expected to replicate their NTSC Grade B service area in order to drive demand for digital programming in that area. No station should be allowed to retain its free second channel because a significant number of households located outside of its NTSC Grade B service area never received a digital signal in the first place. There is no reason to interpret this section in a manner that would allow a station to retain its analog channel even if more than 85% of the television household to which it provides a

programming signal have digital equipment. That is directly contrary to the intent of Section 309 and the essential objectives of these proceedings.

Network Digital Television Broadcast Test

70. In those markets where there is more than one Top Four Affiliate, the test should be deemed to have been met if one of the Top Four Affiliates is broadcasting a digital signal, whether by licensed facilities, STA or otherwise. Otherwise this aspect of the transition extension test is subject to manipulation, especially if Top Four Stations obtain authority to acquire additional independent stations. The real question is why should any station, let alone a Top Four Station, that has a digital channel be allowed to stay in operation after December 31, 2006 if they have not constructed and are not operating digital facilities by that date?

71. This is yet another example of why the FCC must impose strict “use or lose” penalties for stations that do not meet their obligations of constructing and operating digital facilities which fully replicate their coverage areas. At a minimum the FCC should interpret this provision in such a manner that any broadcast of a digital programming signal, regardless of coverage, would be sufficient. Digital penetration levels are not important for purposes of this aspect of the transition extension test because they would be considered by the 85% test.

72. Furthermore, no Top Four Station should be included which has failed to construct and operate digital facilities at the minimum required levels, or which does not have a digital channel allotment at all, either because (i) it has been reclaimed by the FCC, (ii) was voluntarily relinquished by the station, or (iii) the station was never granted one for any reason. The FCC must have the ability to reclaim any unused or

underutilized DTV channels from a Top Four Affiliate in any market without that reclamation automatically working to extend the DTV transition in the particular market. If a station forfeits or transfers its digital channel voluntarily, such as in a channel clearing arrangement, that too, should not automatically extend the transition. Clearing arrangements of such sort should be encouraged, especially if it involves an out-of-core channel.

Converter Technology Test

73. Any equipment that is capable of taking the minimum required digital signal and converting it so that the television household can view the programming on an analog set should meet the definition of “digital-to-analog converter” for purposes of Section 309(j)(14)(B)(ii). It is not the goal of the DTV transition that television households actually have the ability to *see* a better picture or have better audio on their analog sets, and it certainly is not to ensure that television households have the ability to view programming in HDTV. So long as the television household has a converter that allows them to continue after the transition to watch television programming provided by the stations in its market, then that television household would be unaffected by the transition. The fact that the converter would not allow them to receive all of the benefits of a digital broadcast is immaterial. The benefits of digital should be reserved for just those households which elect on their own accord to invest in digital equipment. Furthermore, defining “digital-to-analog converters” in such a manner will give consumers a choice of various levels of converters to acquire and spur technological development of less expensive converters.

74. The phrase “generally available” in Section 309(j)(14)(B)(ii) should be broadly construed and include converters available over the internet, from MVPD carriers servicing the area, and those available for purchase by mail order or otherwise. It makes no sense to disregard these valuable and effective marketing arms. Household purchasing patterns will not coincide with their television viewing access, especially in rural markets. It is certainly possible that many television households did not even purchase their analog sets from a store located within the “market” of the local broadcast stations. If the FCC is to allow a station to attempt to utilize this prong of Section 309(j)(14) to extend the transition, then the FCC must examine the purchasing patterns of the households in that “market” and take into consideration those areas to which consumers in the market could be expected to travel to meet their purchasing needs.

75. The number of stores in the market, the prices of converters, and the number of units purchased in a given market are not relevant to this prong of Section 309(j)(14). Those issues would be taken into account in the 85% test. If the prices for converters were too high for the market, then a reduced number of television households in the market would have acquired converters.

15 Percent Test

76. Generally, words and phrases used in a statute should be interpreted in accordance with their plain meaning unless such an interpretation would cause results clearly contrary to the purpose of the statute. A plain reading of Section 309(j)(14)(B)(iii) would require the FCC to first determine whether or not MVPD penetration level in a given market had reached 85%. If not, the FCC would not even consider whether 85% of the television households in that same market had digital capability. However, there is no

basis in legislative history on these DTV proceedings for the statute to reach such a result; therefore, such an implementation is unwarranted and unreasonable.

77. This subsection was enacted to protect analog viewers and to require stations to give back one 6 MHz channel when more than 85% of the television households in the market would not go dark. If 85% MVPD penetration is a condition precedent to the digital penetration test, then more than 85% of the television households in a given market could have digital sets, but the stations in that market could still retain both channels. That is clearly contrary to the intention of the statute and these proceedings.

78. There is, however, support for an interpretation that would capture MVPD customers in the 85% “digital” group, even if MVPD penetration level for the market had not been reached. As quoted in paragraph 86 of the NPRM, the Conference Report in Section 309(j)(14)(B) states:

“However, for purposes of the inquiry under the section, a television household must receive at least one programming signal from each local television station broadcasting a digital television service signal in order not to be counted toward the 15 percent threshold.”

79. Television households can receive programming signals over-the-air and/or via a MVPD. Many households may have one set connected to a pay service and one or more sets which rely over-the-air service. The statute does not require that the household have one set capable of receiving the signals of all stations in the market. So any household that can receive, either via MVPD or by MVPD and over-the air, one programming signal of each station in the market should count towards the 85% penetration target, regardless of how many different sets that household needed to receive such channels.

80. Such an interpretation is reasonable and consistent with legislative history. It would not create an unintended result that could arise if 85% MVPD penetration was an absolute condition precedent to the second prong of Section 309(j)(14)(B)(iii). Such an interpretation would also eliminate the possibility that MVPD customers would not be included with the 85% class just because the cable company did not carry the signal of “every” digital station in the market. No cable company carries every station in its market and stations can deny retransmission consent. But that does not negate the fact that, for example, the cable company could carry a programming signal of every station in the market but one, and if the cable customer could pick up the digital signal of the one station not carried over cable on one set, and the remaining stations on another set. In that case the television household should be included in the 85% class.

81. Such an interpretation, which basically requires the FCC to ignore the “and” at the end of Section 309(j)(14)(B)(iii)(I), is also important if the FCC interprets “carries” to include a downconverted digital signal, as it should. If a MVPD downconverts the digital signal from a station and transmits the converted signal to its customers so that they can view the programming on their analog sets, that is no different from the situation where a digital-to-analog converter set-top box is used to convert the digital signal. There is no reason to distinguish between the location of the device that converts the digital signal. The fact remains the same – the analog set can still be used to watch cable television and pick up local channels.

82. The MVPDs should be allowed to choose the best method to protect their analog customers – either provide them a digital-to-analog converter or provide the conversion at the front end. In either case the analog set can still be used to watch television without significant additional investment by the television household.

83. In fact, the best way to promote the DTV transition, protect analog household, and reclaim spectrum would be to require MVPDs to carry a station's digital signal and downconvert that digital signal after December 31, 2006, and thereafter until 85% of its customers have digital sets or converters. With such a provision, the digital penetration test would focus on the over-the-air viewers in a given market.

84. Regardless of whether or not the MVPD prong is interpreted to be an absolute condition precedent to the second prong of this Section, it would be unreasonable to interpret Section 309(j)(14)(B)(iii)(I) in such a manner that it could be frustrated at will by manipulation or is virtually impossible to be met. The term "stations" should be defined to apply *only* to those stations in a market which (i) the MVPD has a digital must carry obligation, (ii) has granted retransmission consent and (iii) which can deliver the digital programming to the MVPD headend or local receive facility at such minimum quality levels as the FCC should require. Otherwise this subsection is prone to manipulation by both broadcasters and MVPDs.

85. Limiting "stations" to only those *entitled* to must carry is still insufficient. Since a station can deny retransmission consent for any reason, the term "station" for purposes of this subsection should not include those stations which do not grant retransmission consent. Otherwise the door to manipulation is wide open. One station, the smallest least profitable station in the market with viewership so low that it cannot even be monitored could deny retransmission consent and the DTV transition in the market continue indefinitely.

86. Stations which cannot or do not provide a good quality signal to the cable or MVPD headend or receive facility should not be included as well. That leaves the door too far open for manipulation.

87. Class-A LPTV and other secondary non-Class A LPTV and TV translators should not be included in the definition of “stations” unless the four requirements we propose in above are met. LPTV stations have never been included in the term “stations” for purposes of the DTV transition – that is, for purposes of granting DTV allotment channels and obligations to provide digital signals, LPTV and other secondary stations we not included. There is no reason to do so now.

88. The second part of the 15% test, Section 309(j)(14)(B)(iii)(I)(a) and (b), should likewise be construed broadly to recognize that a television household will not lose the ability to watch television if it has any equipment that allows members of such household to continue to watch programming from those stations which produce a signal they are able to pick up. Interpretation of this section should be technologically neutral.

Technology could be created that would allow an analog household to connect their television set or other receiver to a home computer and continue to watch television. The terms “receiver” and “converter” must be sufficiently broad to capture such devices.

89. The term “television stations licensed in the market” in this second prong should be limited to full power television stations in the market which are providing a digital programming signal that meets minimum operating requirements. In any market there could exist on December 31, 2006, or any time thereafter, a television station that was not providing a digital service signal for whatever reason. Those stations clearly were not intended to be counted here. LPTV and other secondary stations also should not be included.

90. The phrase “receiving the digital television service signals” in Section 309(j)(14)(B)(iii) should be limited to the digital signals transmitted with the standard modulation and should be limited to the programming signals. It is possible that a station

could, for example, broadcast a digital signal in COFDM. That signal should not be included. Digital signals that are more than basic programming signals most likely will require equipment that is more expensive and sophisticated than basic SDTV programming signals. Once again, the purpose of the transition is not to ensure that 85% of the television households can enjoy all of the benefits of digital broadcast.

91. It is obvious that Section 309(j)(14)(B)(iii) is not clear on its face and is subject to numerous potential definitions of key terms and phrases. This subsection cannot be made clear by regulatory action regardless of the FCC's expertise in this area. This subsection requires Congressional attention and it is the FCC's responsibility, as the agency primarily responsible for interpreting and implementing the subsection, to inform Congress of that fact. Regardless of how the terms and phrases are interpreted, it is certainly possible, and probably very likely, that one or more stations may take issue with the FCC's interpretation when faced with being required to relinquish one of its free 6 MHz channels, and file a lawsuit for judicial review. Lawsuits of such nature could arise nationwide at various times since not every market is expected to convert to digital at the same time. Courts in different jurisdictions could reach different conclusions regarding the interpretation of the same term or phrase. One or more courts could determine that the entire Section is unconstitutionally vague and therefore unenforceable. Lawsuits of this nature could extend the transition many years and would cost the taxpayers millions of dollars. This Section demands Congressional attention now, not later. At the very least Congress should be requested to establish a statute-of-limitations establishing May 1, 2004 as the last date by which any station could challenge any interpretation of the terms and phrases of Section 309(j)(14) adopted pursuant to this NPRM. That would give the FCC at approximately 2.5 years to litigate the issues before the December 31, 2006 initial

target date when determinations will first be required. While that probably will not be sufficient time to wade through the litigation that could be expected to arise, it would be a good head start. There is no reason to wait until the end of 2006 just to begin the litigation process.

Fact Finding Under 309(j)(14)

92. In order to prevent the opportunity for manipulation and to give all interested parties as much confidence as reasonably possible regarding the accuracy of the facts underlying a FCC determination regarding the transition extension provisions of Section 309(j)(14), the FCC must perform or oversee the fact finding process. Stations would not want New Licensees to be responsible for organizing and conducting the surveys any more than New Licensees would want the stations organizing and conducting the surveys. Complete oversight by the FCC is consistent with the limited statutory history quoted in paragraph 93 of the NPRM and is necessary to an orderly and consistent implementation of the statute.

93. While the FCC should be required to conduct the surveys, the statutory language is clear and unambiguous that such determinations must be made on a market-by-market basis and only if requested by a qualifying “station” in that market. However, neither the statutory language nor its history indicates that the FCC should pay for the survey and resulting costs and expenses. Any station that requests such an extension should be required to reimburse the FCC for all outside costs incurred in the fact finding process, as well as all internal costs and expenses of the review and determination process.

Furthermore, if a requesting station is denied the extension, they should be subject to a financial penalty. There is no reason for the taxpayers nationwide to subsidize a station’s

request for an extension of the transition in their market. There must be some economic penalty if they “loose” or stations would have an incentive merely to file for an extension in order to hold on to one of their free 6 MHz channels a little longer.

94. The FCC’s review process must be structured so that New Licensees have adequate opportunity to participate and provide alternative surveys or contest the survey results. New Licensees will have a property interest in the spectrum and should be provided the opportunity to participate.

95. The timing of subsequent reviews of the transition extension requests should be based on the grounds for granting the extension. If the transition is extended because one of the Top Four Stations was not broadcasting a digital signal in the market, then the review proceeding would be adjourned until the Top Four Station(s) that was not providing a digital signal first began to do so. At that time, the FCC on its own motion should proceed with an examination of the remaining tests in Section 309(j)(14). In that instance the requesting station would have the option to withdraw its extension request, avoid the additional expense of the proceedings and the potential penalty, and relinquish one of its channels.

96. If the grounds for extension are based on the lack of “general availability” of converters in the market, then the FCC should renew its examination of the market upon receipt of a request from any person or entity that converters are in fact “generally available” in the market. In that instance the requesting station would have the option to withdraw its extension request, avoid the additional expense of the proceedings and the potential penalty, and relinquish one of its channels.

97. If the grounds for the extension are based on the lack of 85% digital penetration, then the FCC should review the determination with new surveys and proceedings

annually, or earlier at the request of a New Licensee which agreed to pay the costs of the review. The FCC has the obligation to ensure that a requesting station is not allowed to retain both 6 MHz channels after the digital penetration levels have been met. Congress clearly intended the return of one 6 MHz channel either at the end of 2006 or as soon thereafter when digital penetration met the 85% level. Reviewing the determination on an annual basis is warranted due to the intent of Congress, the value of the spectrum cleared, and the public benefits that could be expected from efficient use of the cleared *700 MHz Band* spectrum for alternative digital wireless uses. Waiting longer than one year does not promote spectral efficiency or the rapid return of spectrum. The requesting station would have the option to withdraw its extension request prior to an annual review, avoid the additional expense of the proceedings and the potential penalty, and relinquish one of its channels.

98. Any transition extension should be station specific. That is, in the event of a change in control of the station, the extension should terminate unless the parties to the change of control request a new FCC analysis as a part of the change in control proceedings. Furthermore, the transition extension should terminate upon a determination that the station is not operating its digital facilities with full replication and at full power, or fails to meet its simulcasting obligations. A station cannot be allowed to extend the transition in its market then fail to meet its digital operating obligations.

DTV Labeling Requirements and Consumer Awareness

99. Clear, plain and accurate labeling is absolutely necessary at this point in the DTV transition process. The FCC should have review approval of all such labeling. There is no potential public benefit to be derived from anything less. History demonstrates that

the equipment manufacturers and retail outlets cannot be relied upon to accurately inform potential purchasers of the true capabilities of new digital sets, regardless of their good intentions. Definite steps are necessary at this time to ensure that the consumers who purchase sets today are able to make full and informed purchasing decisions.

VI. CONCLUSION

For all the foregoing reasons, Aloha urges the Commission to adopt the urgings set forth herein.

Respectfully submitted,

CAVALIER GROUP, L.L.C.
2679 Crane Ridge Drive
Suite C
Jackson, MS 39216
(601) 420-7029

CAVALIER GROUP, L.L.C.

/s/ R. Nash Neyland
R. Nash Neyland

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